UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ATLANTA HAWKS, LP, et al.,

Plaintiffs,

v. 11 Civ. 5369 PGG

MATT BONNER, et al.,

Defendants.

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September 7, 2011
5:00 p.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP (NYC)
Attorneys for plaintiffs
BY: JEFFREY A. MISHKIN, Esq.
ANTHONY JOSEPH DREYER, Esq.
Of counsel

DEWEY & LeBOEUF, LLP (NYC)
Attorneys for defendants
BY: JEFFREY L. KESSLER, Esq.
DAVID GREENSPAN, Esq.
Of counsel

(Teleconference in chambers)

(Case called)

THE COURT: Okay. I should tell you both that I do have a court reporter, so I would ask you to identify yourself before you speak so that we have an accurate record.

This is a premotion conference to discuss the defendants' desire to file a motion to dismiss. The defendants claim that there is no actual case or controversy and that, accordingly, this Court lacks subject matter jurisdiction.

Plaintiffs contend that defendants' repeated threats to bring an antitrust action, together with certain authorizations they obtained from the players to bring such an action as well as the players' alleged long history of bringing antitrust cases against the league, provide a sufficient basis for this Court's exercise of subject matter jurisdiction.

Based on the correspondence I've received from the parties, it is not clear to me at this stage that there is a good-faith basis for a motion to dismiss. I have reviewed the cases the defendants have cited in their August 5th, 2011 letter. I do not find them persuasive, beginning with the Youngels case, which is the Second Circuit summary order. Summary orders, of course, have no precedential effect. Even if the case had precedential effect, it concerns a provision in a collective bargaining agreement that the defendant had never invoked and never threatened to invoke.

The Newline case cited by the defendants is similarly not on point because it concerned a master license agreement that the plaintiffs had never signed. As Judge Stein said in that case, "There is no existing relation between the parties to settle or clarify. Any harm that may arise under a contract not yet entered into is in this instance necessarily speculative."

The NHL case involves a somewhat similar scenario to what we have here in that the league brought a declaratory judgment action seeking a ruling that its "equalization rules" did not violate the antitrust laws. The court dismissed the case for lack of subject matter jurisdiction, finding that there there was no actual case or controversy.

It does appear to me from what I have seen so far that the factual record in this case appears different, the factual record in the NHL case appears quite different, at least based on what I have seen so far, from the allegations of the complaint in this action.

In the NHL case, the players' union stated in the letter to the league that were the owners to impose the terms of an allegedly expired collective bargaining agreement on the players, such an action, "plainly would violate the antitrust laws and would subject the league and its teams to treble damages."

The court went on to find, however, that the union had

no standing to bring an antitrust action and concluded, as to the individual player defendants, that the threat in the letter about antitrust litigation was no more than mere puffery, or as the court said, and I quote, "nothing more than typical collective bargaining posturing."

The court's finding in this regard was supported by affidavits from each of the defendants, stating that they had no intention of bringing an antitrust action, that they had never expressed any intention to bring such an action and that they had not authorized anyone to convey a threat of such litigation on their behalf.

The court went on to state, and I quote, "In light of these uncontroverted affidavits, this Court cannot find that plaintiffs have demonstrated a concrete dispute of sufficient immediacy to provide subject matter jurisdiction over this declaratory judgment action."

Here, in contrast, plaintiffs assert:

One, defendants have consistently raised the threat of an antitrust action during the labor negotiations;

Two, they have obtained authorizations from the players that would permit them to pursue the antitrust litigation option; and

Three, the union and its players have a long history of filing antitrust actions in the midst of collective bargaining negotiations.

Plaintiffs have also cited cases from the circuit standing for the proposition that once a party has threatened litigation, it may not deprive a court of subject matter jurisdiction by saying that it had changed its mind or presently does not intend to bring suit. Given these facts and the legal precedence cited by plaintiffs, I am concerned whether there is a good-faith basis here for a motion to dismiss.

So, Mr. Kessler, I'll hear from you as to why you believe there is a good motion here.

MR. KESSLER: Thank you, your Honor.

First, your Honor, let me say that the allegations of the complaint here are somewhat different than your Honor may have the impression from reading their letter, which is really not quite what their complaint states.

What the complaint alleges is that there is a claim to decertify the union, but that no, they don't allege there has been any decision made to decertify the union, that any action has been taken to decertify the union, that any steps have been taken to decertify the union. Quite to the contrary, we have had a collective bargaining session today and we have complaints pending before the NLRB invoking the rights as a union. As their complaint argues, under the case law that has developed, it is the league's position that if the union is still in place, there can be no antitrust claim. That is their

position.

And that did not exist previously, prior to the decision of Brown versus Pro Football or the decision in this circuit. Based on that position, they are forced to allege that if the union decides to disclaim collective bargaining in the future and if it then supports an antitrust action, that such a future disclaimer would be in bad faith and not capable of ending the labor exemption to the antitrust laws.

Those are all entirely hypothetical facts, and I am quite confident that if your Honor gives us a chance to brief this issue, we can demonstrate on both prevailing Supreme Court law in Penamou and the Southern District case, North American Airlines versus Brotherhood of Teamsters, 2005 WestLaw 646350, decided in 2005, that we did not cite in our letter, that there can be no case or controversy. And as your Honor, of course, knows, jurisdiction is the issue here, and your Honor even has the authority to determine facts, to determine the jurisdiction with respect to this motion. We do, in fact, believe we have a good-faith basis to argue this is completely hypothetical controversy and, second, that I believe your Honor will likely conclude that there is insufficient jurisdiction.

I will also note that there are no allegations of threats of litigation that would satisfy the 12 (b) standard of pleading in the complaint. They do not identify --

THE COURT: The court reporter is having difficulty

understanding. There is some distortion over the phone lines. If you could slow down and try to speak as clearly as you can, that would be helpful.

MR. KESSLER: Thank you, your Honor. I apologize for that. The reason the North American Airlines case is quite important is that the court points out it had to do with alleged threats of litigation made during collective bargaining, that most typically such statements during collective bargaining do not give rise to a dispute for a justification based on alleged threats, and the court specifically said, and I am quoting, any time parties are in negotiation, the possibility of lawsuit looms in the background, which holds true of collective bargaining as in any negotiation.

Indeed, it is precisely in the circumstances of heated course of bargaining that the courts discount threats to take all appropriate action as typical posturing and not the type of threat that creates an Article III case or controversy.

Your Honor, we are quite confident that the record here, whether facially on their allegations or, if necessary, based on declarations which we would be prepared to put in, that there have been no decisions made to file any antitrust lawsuits, that there have been no decisions made to end our status as a union which would be a necessary prerequisite according to the NBA for us to file such a lawsuit. That

without those decisions and steps, this is a hypothetical controversy, which may or may not ever take place.

I also note, your Honor, what the record will show is that for the past history of the NBA, over 40 years of bargaining, the NBA Players Association has never disclaimed its role as a collective bargaining representative, unlike the National Football League Players Association, one of my other clients, who they point out that even though the authorizations were collected to possibly disclaim bargaining twice before in the history of the NBA, they were never exercised.

THE COURT: Let, let me, let me, let me break in for a second if I could. I have a question for you.

MR. KESSLER: Sure.

THE COURT: Paragraph 38 of the complaint states as follows: In the weeks and months leading up to the expiration of the collective bargaining agreement and continuing to date, the NBPA has made clear it intended to pursue a course of action fully consistent with its prior conduct of:

A. Threatening and seeking to effectuate a purported disclaimer of its role as the players' exclusive collective bargaining representative;

B. Threatening and filing antitrust litigation directed and financed by the NBPA and its lawyers.

So my question to you is: Are you telling me now that there are no threats of antitrust litigation that have been

made in the course of the negotiations regarding the collective bargaining agreement?

MR. KESSLER: What I am saying to your Honor is that if the factual record were developed on this issue, there would not be an adequate basis for there to be a case or controversy. There have been discussions, as there are in any lengthy negotiations, of the different legal options available to the parties. That is far different from what the court, including the Supreme Court of the United States and the Second Circuit and the Southern District of New York, have held to be required in order to invoke the processes of this Court. This is exactly the type of invocation of an advisory opinion.

THE COURT: Let me break in again because I want to make sure I understand your position on this point, so I am going to ask the question again.

MR. KESSLER: Yes.

THE COURT: Is it your position that antitrust litigation was not threatened by your clients in the course of the negotiations regarding the collective bargaining agreement?

Is that your position?

MR. KESSLER: It is my position that my clients never expressed an intention that antitrust litigation will, in fact, be filed. There have been discussions during collective bargaining in which it was discussed what the different weapons and options were that are available, as is always discussed in

collective bargaining, and I am quite confident that is an insufficient basis.

For example, back in the last time that there was a lockout in the NBA, there were discussions that antitrust litigation could be filed in connection with that lockout. It never happened. Back in 1987, the history will show, there were authorizations discussed about the possibility of ending the union.

In fact, there were lots of discussions about that, and it never happened. What there hasn't been is a specific threat. It was mentioned as alternatives, just as they have told us what their various alternative options are. At different times we have had similar discussions with them about alternatives available to the union. That does not create a case or controversy under the prevailing case law. It is an option, not a threat.

THE COURT: Mr. Mishkin, I'll hear from you.

MR. MISHKIN: Thank you, your Honor.

I find it hard to believe what Mr. Kessler is saying unless we are much more quibbling about the meaning of the word, "threat." Threats can be communicated very clearly and yet very politely. There is just no question here, and again we are on a motion to dismiss, so the well-pleaded allegations of the complaint -- and I hope they're well pleaded -- are very clear that we have been told repeatedly that if they don't like

the way it is going at the bargaining table, they will bring an antitrust suit, they will disclaim their union and bring their antitrust suit. It has been said to us over and over and over again.

Your Honor has laid out the law here as clearly as we thought we did in the letter. We have as current an important legal controversy going on right now. We have already locked them out. They say that lockout is unlawful at any moment that they choose, which they can choose at any moment to keep that sword of Damoclese up there, and when they do that, they claim it is a per se violation of the antitrust laws. We say that our lockout is not, right now it is not a violation of the antitrust laws whether or not they ever disclaim.

We have five claims in this complaint, not the one that Mr. Kessler is talking about, and a number of them say whether or not they ever disclaim, we are not committing an antitrust violation by locking them out, and they have threatened to sue over that.

It seems to me we have every element you would have for a classic case or controversy. It is very important. It is having effect on the negotiations now and it certainly is within the subject matter jurisdiction of this Court to issue the declarations we have requested.

THE COURT: All right. Mr. Kessler, what I am going to ask you to do is think about what I've had to say, take

another look at the cases you have cited to me, think about it, send me a letter on Monday telling me what you wish to do with respect to a motion to dismiss. If your decision is you want to proceed with the motion to dismiss, have a conversation with Mr. Mishkin about what an appropriate schedule would be, and you can put that in the letter as well.

Now, let me ask this, Mr. Mishkin: In the event that Mr. Kessler decides to proceed with a motion to dismiss, what is your position as to discovery while the motion to dismiss is being briefed?

MR. MISHKIN: Discovery on the question of subject matter jurisdiction or more broadly?

THE COURT: Well, we can take it separately. We probably should discuss what discovery would be necessary if the parties believe that discovery is necessary on the question of subject matter jurisdiction. That is one issue.

MR. MISHKIN: I would not think so based on the allegations of the complaint and my belief there really is no serious basis to question the allegations necessary for subject matter jurisdiction.

If Mr. Kessler's motion papers suggest some real factual dispute, your Honor, at that point I might ask you, you know, that we might need a little discovery to test that. As I sit here right now, I believe the motion, if he makes it, to dismiss can be decided on the face of this complaint. So I

wouldn't at this moment, not seeing his papers, anticipate any need for discovery on the motion to dismiss on case or controversy grounds.

The other basis, there is at least one cause of action here, perhaps more, on which I would probably want to move for partial summary judgment. The first one certainly that regardless of whether they ever disclaim or don't disclaim, Section 20 of the Clayton Act has already said, by the Second Circuit, exempts lockout, a lockout from antitrust condemnation. I would think that that legal issue ought to be, you know, teed-up very early and dealt with, and that doesn't require any discovery.

I don't know your Honor's practice, whether you would want us to, if such a motion were pending, to proceed with discovery on other claims. It might. There certainly are claims here that would require discovery. We have a separate antitrust claim, I think it is our third claim, in which we say that even putting aside a Section 20 exemption or nonstatutory labor exemption, a lockout, because of its nature and its purpose, is not, is not a violation of the rule of reason.

That would, of course, that would require some discovery. I confess I have not really thought that all the way through yet as to how much, but some period of discovery, if we are trying that claim, yes, we would need discovery.

THE COURT: Mr. Kessler, what is your view as to

whether discovery is necessary on the motion to dismiss that you've proposed?

MR. KESSLER: We are not seeking any discovery with respect to the motion to dismiss. And subject matter jurisdiction, we feel we have a very strong basis to do this. I will, of course, give careful consideration to your Honor's comments, but preliminarily we do believe we're likely to want to seek to pursue this motion and we believe your Honor will conclude that it is proper. We are not seeking any discovery in support of that motion.

THE COURT: So in the letter that Mr. Kessler will send to me, if the decision is to proceed with the motion, he will propose a schedule that he has discussed with Mr. Mishkin, and then the letter should also go on to say what the parties' positions are with respect to whether there should be discovery as to the other claims in the case going beyond the issue of subject matter jurisdiction while the motion to dismiss is being briefed and is pending.

MR. KESSLER: We'll discuss that with Mr. Mishkin, your Honor. Of course, I will say to him preliminarily, if we are right about there being no jurisdiction, it would be inappropriate to proceed with discovery. I think it is a threshold issue. So in general, we think the other claims should proceed until it is determined this Court has the power to adjudicate any of those claims.

THE COURT: Right, and I am not surprised to hear that that is your position. It is my position, generally speaking, that if I have doubts about the merits of a motion to dismiss, I am not going to allow it to hold up the entire case. It may be that you will cite other authorities to me in your letter that will be more persuasive to me on the issue of whether you're right about the absence of an actual case or controversy, but if you don't do that, and I continue to be of the mind that motion to dismiss is likely to fail, I am going to be reluctant to have the case stall until the briefing is completed and a decision is rendered. So think about that and address that, if you would, in the letter that you send on Monday.

MR. KESSLER: Thank your Honor.

THE COURT: Is there anything else that anyone else wants to say?

MR. MISHKIN: No, not at the moment, your Honor. Thank you very much.

THE COURT: All right. I will look for the letter sometime on Monday. Thank you both.

(Court adjourned)